FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 5275
Unknown Respondents	)	

STATEMENT OF REASONS

BACKGROUND:

On February 24, 2004, the Federal Election Commission (FEC) rejected the General Counsel's recommendation to find "Reason To Believe" that unknown persons violated 2 U.S.C. § 441d(a) and 2 U.S.C. §438(a)(4), and close the file. Instead the Commission voted 6-0 to take no action with respect to these recommendations and close the file.

This Matter Under Review (MUR) arose from a complaint filed by Gene Farber, General Counsel for the Friends of David Fink. David Fink was the Democratic nominee for Michigan's 9th Congressional District. He ran unopposed in the primary, but was defeated by incumbent Joe Knollenberg (R-MI) in the 2002 general election. During the primary campaign, around May 2002, a one-page letter with no return address and no disclaimer, signed by a "Former David Fink Supporter" was sent to approximately 500 people. The only thing we can ascertain about this letter is that it was mailed from Royal Oak, Michigan. It included a *Detroit News and Free Press* clipping and an anonymous letter characterizing the Fink-Knollenberg match-up as, "virtually impossible to win" for Fink. The letter went on to say, "our community needs to put its resources behind candidates who can win like the Levin brothers. We will be redirecting our political contributions to races that can win and will ensure a strong pro-Israel voice in Congress."

The General Counsel recommended finding Reason to Believe that Unknown Respondents violated 2 U.S.C. § 441d(a) and 2 U.S.C. §438(a)(4). However, because it would take a lengthy and potentially fruitless investigation to determine who was responsible for this mailing, the General Counsel also

recommended that the Commission close the file in this MUR as a matter of prosecutorial discretion, after finding Reason to Believe. See *Heckler v. Chaney*, 470 U.S. 821 (1985) (authorizing the use of prosecutorial discretion). I write separately because while I do not disagree that a *Heckler* dismissal would be appropriate, I have additional grounds upon which I believe this matter ought to be dismissed.[1]

In my view, this letter did not contain express advocacy, which can trigger a whole host of restrictions under the Federal Election Campaign Act, as amended (FECA), nor do I believe that this letter contained a solicitation within the meaning of FECA, which would have prohibited the use of the contributor information on the FEC website. I also oppose a Reason to Believe finding because of its potential to needlessly embroil the Commission in Constitutional issues, as discussed below.

ALLEGED DISCLAIMER VIOLATIONS UNDER 2 U.S.C §441d(a)

Based upon the text of the letter in question, the General Counsel recommended finding reason to believe that unknown respondents violated the disclaimer requirements of 2 U.S.C §441d(a). This section requires that any communication expressly advocating the election or defeat of a clearly identified candidate include an identification of the person or committee paying for the communication. Pursuant to *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* 479 U.S. 238 (1986), "express advocacy" is limited to phrases such as "vote for," "re-elect," and "support." (See also 11 C.F.R 100.22(a), (2002)).

The letter in question does not use such phrases. Rather, it opines about whether or not Fink has a chance of winning, about problems in the Middle East, and the importance of supporting politically viable pro-Israel candidates. The letter does not urge a vote against Fink. Indeed, it would seem that the writer actually hopes Fink will win, although that is not said, either. It does recommend contributing to "candidates who can win," such as the "Levin Brothers," (presumably referring to Congressman Sander Levin, (D-MI) and Senator Carl Levin (D-MI)). But this phrase clearly does not expressly advocate Fink's defeat since Congressman Levin and Senator Levin were not opponents of Fink. They were candidates in different races, and the letter was a simple message announcing the author's intention to direct his or her contributions to pro-Israel candidates who had some chance of winning. In similar recent cases,

[1] The activity occurred prior to the effective date of the Bipartisan Campaign Reform act of 2002 ("BCRA"), pub. L. 107-155, 116 Stat. 81 (2002) and prior to the Supreme Court's decision in *McConnell v. FEC*, 124 S. Ct. 619 (2003).

(*See e.g.* MUR 5024, Kean for Congress and MUR 5154 and Sierra Club), the Commission did not find express advocacy for similar text and phrases.

ALLEGED IMPROPER USE OF FEC'S CONTRIBUTOR DATA FOR SOLICITATIONS, PROHIBITED BY 2 U.S.C §438(a)(4)

It appears that this letter was sent to several of Fink's contributors and his campaign committee's vendors. This leads the General Counsel to an inference that the sender of this anonymous missive used the FEC public databases for the purpose of soliciting contributions in violation of 2 U.S.C 438(a)(4). The General Counsel urges a broad reading of the statute, based upon the Commission's decision in National Center for Tobacco Free Kids (NCTFK), Advisory Opinion 2003-24[2], which stated that 2 U.S.C §438(a)(4) was a "broad prophylactic measure" to protect public minded citizens from harassment, and not a narrowly drawn solicitation ban. This misreads AO2003-24. The crucial point in that advisory opinion was that the requestor sought to use the list for commercial purposes, contrary to the Act. Commissioner Weintraub argued that NCTFK should be allowed to use our donor lists because it is a non-profit entity, and hence, not engaged in commercial activity. We disagreed with that line of analysis and our decision turned upon the fact that NCTFK was furthering its commercial (albeit non-profit) mandate.

However, in this instance, a distinction can and should be made. Here we appear to have an individual sending letters merely expressing his or her opinions. As such, I disagree with the notion that there was any solicitation within the meaning of the FECA. (*See* Statement of Reasons by Commissioner David M. Mason in this MUR). A finding that this letter constituted a solicitation would increase the scope of our holding in AO2003-24, sweeping up respondents who did not solicit any contributions and were not attempting to advance any type of commercial or organizational mandate. The Unknown Respondent is offering his or her opinions on politics and government policy, which lie at the very heart of the First Amendment. The sender of this letter states that "we will be redirecting our contributions" to viable candidates. The anonymous author does not ask or direct the letter's recipients to send financial contributions to Fink's opponents, or any other candidates, nor is the author raising funds as was the case in AO2003-24.

Beyond the statutory issues, I believe the General Counsel's analysis needlessly embroils the Commission in constitutional questions. In *McIntyre v. Ohio Election Commission,* 514 U.S. 334 (1995), the Supreme Court stuck down an Ohio law prohibiting distribution of anonymous campaign literature. The General

[2] Federal Election Commission. Minutes of an Open Meeting, October 9, 2003 at 6. (Commissioners Mason, Smith, Thomas and Toner voted affirmatively; Commissioner Weintraub dissented).

Counsel's analysis does not suggest that the Unknown Respondent in MUR 5275 did not have the right to publish and disseminate the letter. But, by accepting the principle that a disclaimer is required in this instance, the Commission implicates the Unknown Respondent's right to do so anonymously. In *McIntyre* the Supreme Court stated that "under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *McIntyre*, 514 U.S. at 357. The reach of the *McIntyre* decision is uncertain, particularly in light of *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003). (*See Majors v. Abell*, 2004 WL 502206, (3/15/04, 7th Cir. (Ind.)), Easterbrook, *dubitante*).

However, at a minimum, I believe that *McIntyre* serves as a useful caution for regulators. In light of *McIntyre*, the FEC should tread lightly around our fellow citizens who exercise their free speech rights under the 1st Amendment of our Constitution, at least in situations such as this, where there is no express advocacy, and where the expenditures appear to be at a very low level. Given that this case was dismissed pursuant to *Heckler*, I see no reason to wade into the Constitutional thicket of anonymous speech with a Reason to Believe finding.

3/30/04
Date

Bradley A. Smith, Chairman